



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 29, 2016

Ms. Karla Schultz  
Counsel for Hays Consolidated Independent School District  
Walsh Gallegos Treviño Russo & Kyle P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2016-09748

Dear Ms. Schultz:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 607954.

The Hays Consolidated Independent School District (the "district"), which you represent, received two requests for (1) all documents pertaining to a specified investigation; and (2) the "360" survey taken by district administrators and the instructions, result reports, responses and leadership team comments related to the survey. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

*Id.* § 552.022(a)(1). The submitted information includes a completed investigation subject to section 552.022(a)(1) of the Government Code. The district must release this information, which we have marked, pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* You seek to withhold some of the information at issue under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to Gov't Code § 552.111 subject to waiver). Therefore, the district may not withhold the information subject to section 552.022(a)(1) under section 552.103 or section 552.111. However, we note section 552.117 of the Government Code makes information confidential under the Act.<sup>1</sup> Therefore, we will consider the applicability of this section for the information subject to section 552.022(a)(1). We will also consider your arguments for the information not subject to section 552.022(a)(1).

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

This office has long held that “litigation,” for purposes of section 552.103, includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You assert litigation against the district is currently pending because concurrent with the district's receipt of the instant requests, the requestor filed internal grievances with the district. You explain grievances filed with the district are “litigation” in that the district follows administrative procedures in handling such disputes. You inform us the district's policy includes a three-level process wherein hearing officers hear the grievance at Levels I and II, and the district's board of trustees hears the grievance if the grievant appeals to Level III. You further inform us these administrative proceedings are recorded and a record is created. The grievant is allowed to be represented by counsel and may present evidence during the proceedings. You state factual issues are determined at the lower levels and the board of trustees acts as a quasi-judicial body for the final appeal. The board may not re-adjudicate factual issues and the board's decisions must be based on the record of the proceeding below. Based on your representations and our review, we find the district's administrative procedure for disputes, as described above, is conducted in a quasi-judicial forum. Thus, the district's administrative procedure for disputes constitutes litigation for purposes of section 552.103. Having reviewed your arguments and the information at issue, we determine the district was involved in pending litigation at the time it received the requests for information. Further, we find the information in Tab 4 not subject to section 552.022 is related to the litigation involving the district that was pending on the date the requests were received. Accordingly, we find the district may withhold the information

in Tab 4 not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.<sup>2</sup>

We note that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Section 552.117 is also applicable to cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Accordingly, the district must withhold the cellular telephone numbers we have marked under section 552.117(a)(1) of the Government Code if the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body. The district may not withhold this information if the individuals whose information is at issue did not make a timely election to keep the information confidential or the cellular telephone service is paid for by a governmental body.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of the information at issue.

In summary, the district may withhold the information in Tab 4 not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. If the individuals whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the district must withhold the cellular telephone numbers we marked under section 552.117(a)(1) of the Government Code. The district must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Abigail T. Adams  
Assistant Attorney General  
Open Records Division

ATA/akg

Ref: ID# 607954

Enc. Submitted documents

c: Requestor  
(w/o enclosures)